CASE NO. 3663

United States
Circuit Court of Appeals
3

For the Ninth Circuit.

TISDALE I. VAN ATTA,

Plaintiff in Error,

vs.

THE MONTANA NATIONAL BANK, a Corporation,

Defendant in Error.

Brief of Defendant In Error

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Statement of Case.

The statement of facts disclosed in the Brief of plaintiff in Error are in many instances wrong and Defendant in Error therefore has deemed it advisable to here state the facts as disclosed by the record.

Prior to 1914 the Plaintiff in Error and one Dr. W. F. Guy operated a ranch in Rosebud County, Montana, under a partnership agreement (Tr. 57). During that year they sold this ranch to a man by the name of Mike Morley and took in payment of the same certain property in Great Falls and also five

notes, dated June 12, 1914, signed by Mike Morley and his wife, in favor of Plaintiff in Error and said Guy, amounting to Eleven Thousand Five Hundred Thirty-five Dollars ($11,535.00). It further appears that these partners had incurred partnership debts, both to the First National Bank of Forsyth, at Forsyth, Montana, and to the Bank of Montana at Billings, Montana. The notes, amounting to Eleven Thousand Five Hundred Thirty-five Dollars ($11,-535.00), were pledged by the partners to the First National Bank at Forsyth to secure a partnership debt owing to that bank, which amounted to a little more than Four Thousand Dollars ($4,000.00). At this same time Plaintiff in Error himself personally owed the Bank of Montana two notes aggregating Sixteen Hundred Fifty Dollars ($1,650.00 and a partnership note in the sum of Fifteen Hundred Dollars ($1,500.00). Matters ran along in this way for a short time and neither Plaintiff in Error or his partner, Dr. Guy, were able to pay the First National bank of Forsyth, and thereupon the First National Bank of Forsyth sold these notes which had been placed with them under collateral pledge agreement, the purchaser being the Bank of Montana (Tr. 59), the purchaser paying Forty-five Hundred Thirty-six and 35-100 Dollars ($4,536.35), being the full amount that Plaintiff in Error and said Guy owed the First National Bank of Forsyth at that time, and thereupon the Bank of Montana became the owner of these so-called Morley notes.

Prior to this time the bank of Montana had instituted a naction against both Van Atta and Guy to

recover on the indebtedness they owed the said bank, both as partners and individually, the same amounting, as stated above, to Thirty-one Hundred Fifty Dollars ($3,150.00). At the time the bank purchased these so-called Morley notes from the First National Bank of Forsyth it made a deal with W. F. Guy, who was a partner of Van Atta, whereby Guy put up his individual note in the sum of Eight Thousand Two Hundred Twenty-one and 61-100 Dollars (8,221.61), and which note was put up in payment of the money that the Bank of Montana had paid to the First National Bank of Forsyth for the Morley notes, and also in payment of the notes that the Bank of Montana held against Van Atta individually and Van Atta and Guy as partners, and also included some costs and expenses the Bank of Montana had been put to. In other words, the Bank of Montana at that time delivered to W. F. Guy the so-called Morley notes and the Guy and Van Atta notes that the partners owed the Bank of Montana, and also the Van Atta note that he owed the Bank of Montana, and at the same time Guy delivered to the Bank of Montana the Morley notes as security for his note of Eight Thousand Two Hundred Twenty-one and 36-100 Dollars ($8,221.36) that he had given to the bank, and on the same day signed a collateral pledge agreement. It appears further from the record that Guy was unable to pay his note to the Bank of Montana when the same came due and that the bank thereupon, in due course, sold the collateral, the same being the Morley notes, and it became the purchaser.

The pledge agreement under which the First Na-

tional Bank of Forsyth sold the Morley notes, which are the notes in dispute, is found on Pages 58 and 59 of the Transcript, and the collateral pledge agreement, under which the Bank of Montana sold the so-called Morley notes under its agreement with W. F. Guy, is found on Pages 97 and 98 of the Transcript.

The record further discloses that these Morley notes were secured by a mortgage on this ranch in Rosebud County, Montana, upon which there was a prior mortgage of Ten Thousand Dollars ($10,-000.00), and that the first mortgage was subsequently foreclosed and the property bid in by the Defendant in Error and that the second mortgage securing the so-called Morley notes was likewise forclosed and the property bid in by the Defendant in Error, and that the period of redemption has expired in both instances.

We therefore find from the facts as disclosed by the record that the Bank of Montana obtained title to the so-called Morley notes by purchasing them from the First National Bank of Forsyth under a collateral pledge agreement and that it in turn obtained them the second time under a collateral pledge agreement sale with W. F. Guy. The record, as shown above, discloses that Guy and Van Atta as partners, and Van Atta as an individual, was indebted to the Bank of Montana in approximately the sum of Eight Thousand Dollars ($8,000.00), and that Plaintiff in Error has never paid any part of that, and he now comes into court and claims that he was the owner of one-half of these Morley notes and

seeks to obtain the value of one-half of them from the Defendant in Error.

Also, Plaintiff in Error attempted to maintain his action upon the theory that the Morley notes were not partnership property; nevertheless, the record is absolutely conclusive that they were partnership property. Plaintiff in Error himself testified, upon cross-examination, that he and Dr. Guy owned this ranch in Rosebud County as partners and that they never settled their partnership differences (Tr. 58). The record shows this statement: "The notes in question (referring to the Morley notes) here were really owned by me and Dr. Guy as partners resulting from the sale of the ranch." The original complaint filed in this case by Plaintiff in Error discloses that he and Dr. Guy owned these notes as partners (Tr. 63).

For a further statement of the facts in this case, we respectfully refer to Judge Bourquin's statement at the time he directed a verdict in favor of Defendant in Error (Tr. 103-4-5-6-7-8).

Counsel for Plaintiff in Error attempted to show there was a settlement of the partnership affairs between Guy and Van Atta but this was contrary to the facts as disclosed, and further, it was directly opposed to the positive statement of the Plaintiff in Error himself.

Argument and Authorities.

Plaintiff in Error has set forth a number of assignments of errors. Assignments numbered 1, 2 and 3 deal with matters brought out on cross-examination by Defendant in Error, and inasmuch as

Plaintiff in Error has not cited any authorities or shown in any manner how he was prejudiced by this line of cross-examination, we shall pass the same without further comment except to state that we submit the examination was entirely proper and that no error can be predicted upon the showing made in the record. Assignments of error numbered 4 and 5 are not well taken for the reason that Plaintiff in Error made no offer of proof after the court sustained Defendant in Error's objection to the question. No authorities need be cited to show that before any error can be predicted upon the action of the court in sustaining the objection to a question that an offer of proof must be made showing what testimony is desired to be introduced, and this is, of course, true where the question does not of necessity disclose what the party desires to prove. We believe that no authorities need be cited upon the first five assignments of error, as we do not believe Plaintiff in Error is considering them seriously.

We submit that the trial court was correct in sustaining the motion of Defendant in Error for a directed verdict. The court, in allowing the motion, stated quite clearly upon what grounds the motion was sustained, but we submit that the court was not only right in sustaining the motion upon the ground as set forth by him, but that the motion should likewise have been sustained upon any one of the various grounds set forth by the Defendant in Error at the time it made the request for the directed verdict (Tr. 100-101-102). As shown by the court's statement to the jury at the time he granted the motion

for a directed verdict, he disclosed very clearly that these notes were partnership property, and if Plaintiff in Error had any right to any part of them it was necessary for him to ask for an accounting and go into a court of equity. The statement of the court is so plain and so conclusive that we don't believe Plaintiff in Error will seriously contend that any other rule should prevail. The record is clear and convincing that the notes in question were partnership property and that Plaintiff in Error and Guy were partners in reference to them, and that therefore Plaintiff in Error could not maintain an action in respect to these notes in the form and in the manner as set forth in his complaint. And, in addition to that, the court very properly stated that the statute of limitations was a bar to the action (Tr. 102), which will be discussed more fully hereafter, and we therefore respectfully submit that the trial court did not err in granting the motion for a directed verdict, as is shown by the following authorities:

I.

The fact that Guy and the Plaintiff in Error were partners in the ownership of the property in question precludes an action on the part of Plaintiff in Error alone, and this is true even though the alleged conversation took place with the consent of the copartner. This was expressly so decided in the case of Sidelar vs. Walker, 27 N. E. 59 (Ill.), in which the Court said this:

> "A partner's right to a partnership property is an ownership of all the assets of the firm, sub-

> ject to the ownership of every other co-partner; all other partners holding all the firm assets subject to the payment of the partnership debts and liabilities. It is clear, therefore, that the individual interest of the partner in the firm property and business can only be ascertained by a settlement of the partnership. Until plaintiff's actual interest in the partnership has been determined, there can be no ascertainment of his damages."

It would seem, therefore, that there can be no question but what Plaintiff in Error has no standing in this court upon the record as disclosed in this action.

II.

Assuming, however, that he did own this property jointly with Guy and that his interest was a half interest, even so, under the circumstances as disclosed here, the Plaintiff in Error did not make out a case. The record here discloses that the Bank of Montana came into possession of these notes which Plaintiff in Error claims were converted, by a sale under collateral pledge agreement by the First National Bank of Forsyth, and therefore the Bank of Montana became the absolute owner of this property and it could do with it as it saw fit. Upon coming into possession of the property, if it so desired, it could sell the notes to whomsoever it wanted to, and when it delivered the notes to W. F. Guy it was clearly within its rights. This has been passed upon so frequently that the principle is now well settled. Jones on Pledges, Paragraph 418, makes the follow-

ing statement:

> "The pledgee may assign his interest in the pledge and the assignee will stand in his place."

Paragraph 422 by the same author says this:

> "A pledger cannot therefore, upon an assignment of the pledge by the pledgee, with the debt secured, maintain an action of trover against him as for a conversion of the property though his assignee may have converted the pledge to his own use; nor can the pledgor maintain replevin or detinue for the thing pledged in the hands of the pledgee's assignee without paying or tendering the debt secured by the pledge. Such an action assumes an immediate right of possession in the pledgor, but he has no such right wihtout paying off the debt.
>
> "A pledgee may sell or assign the thing pledged, and the pledgor cannot recover the property of the purchaser without paying or tendering him the amount due thereon."

No matter what position Plaintff in Error may desire to take in this controversy, it cannot be denied that Defendant in Error at the time it purchased these alleged Morley notes from the First National Bank of Forsyth, succeeded to all the rights of that bank to the property in question. It at least succeeded to its rights in those notes. We submit, however, insofar as the record discloses here, that upon the sale of the Morley notes by the Bank at Forsyth the Bank of Montana thereupon became the absolute owners of those notes unless there could be some showing made that the sale was not legal,

and there hasn't been any showing made insofar as this record is concerned.

In the case of Williams vs. Ashe, 43 Pac. 595 (Cal.), we find the following principle of law laid down by the court, which we believe is applicable to the facts here:

> "We are, however, here concerned not particularly with the rights of one who, in the belief that he was purchasing absolute title, has bought property from a pledgee under circumstances which, as found by the jury, did not vest any title in him. Does the purchaser under such circumstances obtain no property or interest in the goods, or does he at least succeed, by purchase, to the interest of the pledgee. * * * But, whatever may be the foundations for the distinction, it is now most firmly established in the law that a pledgee may sell or assign either the property, or his interest in it, to a bona fide purchaser, who will be allowed to hold the property until extinguishment of the original obligation. The only question which, under the circumstances, would seem to admit of controversy, is whether the creditor to whom the transfer is made should be permitted to retain the pledge until the original debt was discharged, or whether the owner might recover the pledge in the same manner as if the case was a naked tort without any qualified right in the first pawnee. The hardship and injustice of the latter alternative have been so obvious to the courts that late decisions have removed the

doubt expressed until the rule may be taken as settled that the purchaser under such circumstances succeeds to the rights of the original pledgee. And there can be no reason why it should not be so. If one purchases what he believes to be the absolute title he should not, for his mistake, be denied the right of taking the property which the seller (the pledgee) could convey. It works no hardship upon the pledgor who, as against the substituted pledgee, has all the rights he possessed against the pledge."

To the same effect we see the following cases:

Jarvis vs. Rogers,
15 Mass. 389;

Belden vs. Perkins,
78 Ill. 449;

Moffat vs. Williams,
36 Pac. 914;

Talty vs. Trust Company,
39 U. S. 321;

Brittan vs. Oakland Bank of Savings,
57 Pac. 84.

III.

Plaintiff in Error was not entitled to maintain his action even though he might be considered the owner of one-half interest of the notes in question, for the reason that he has not alleged in his complaint, nor was there any evidence offered to the effect that he was willing to pay or tender to the Defendant in Error the original amount which he owed to the First National Bank of Forsyth or to the Bank of Montana. See the following authorities:

Jones on Pledges, Paragraph 570;
Bowers on Conversion, Section 76;
Talty vs. Trust Company (Supra);
Cooper vs. Ray,
47 Ill. 53;
Jarvis vs. Rogers (Supra);
Cumnock vs. Newbury Port Savings Institution,
7 N. E. 869 (Mass.);
Glidden vs. Mechanic's National Bank,
42 N. E. 995 (Ohio);
Wilkins vs. Redding,
97 N. W. 238 (Nebr.);
Dearborn vs. Patterson,
19 Mont. 231.

The Court in the Montana case last above cited said this:

> "By mere conversion of a pledge, a pledgee does not necessarily annul the contract upon which it rests. A conversion by a pledgee does not per se absolve the pledgor from the payment of the debt he has secured. As a rule, before a pledgor can recover the property pledged, or its value, in an action for conversion, he must establish a right of possession. Without right of possession such a suit is not maintainable; and the right to the possession of the property which he has pledged follows from the extinguishment of the debt secured or a sufficient tender of payment of such debt. A tender of what was due Murray was essential for the establishment of the right of plaintiff to recover in this action."

It would seem, therefore, that there can be no question but that Van Atta, before he could maintain any action against the Defendant in Error, no matter what view of the law or upon what theory he might frame his case, he would be obliged nevertheless to allege and prove tender of payment of the amount that he owed the bank. He cannot be heard to say that he doesn't owe the bank anything because the bank sold the notes to Guy, and at the same time say that the bank converted the notes by selling them to Guy. Such a proosition is untenable.

IV.

Plaintiff in Error, under the facts as disclosed by this record, cannot maintain an action against the Bank of Montana or the defendant bank, for the reason that the defendant bank, by bona fide transaction, disposed of the notes in question to W. F. Guy. If Van Atta has any action at all it is, therefore against Guy, who became the defendant bank's successor to the note in question at the time W. F. Guy gave his note to the bank, subject nevertheless, of course, to the collateral pledge agreement which Guy gave to the bank at that time.

This question arose in the cases of Goss vs. Emerson, 23 N. H. 38, and Bank of Forsyth vs. Davis, 38 S. E. 836 (Ga.) in which latter case the Court laid down the following proposition of law:

> "The controlling question in this case is whether the payee of a negotiable promissory note with whom other notes of like character have been deposited as collateral security, is liable to the depositor for conversion of the collat-

erals by one to whom the payee had transferred the principal note and who, as a result of such transfer, came into the possession of the collaterals. The solution of this question depends on whether the payee in the original note had a right to transfer the collaterals. He was certainly authorized to transfer the principal note which was his property. If he could transfer the debt due him, is there any good reason why he should not have been allowed, at the same time, to transfer the property which he had received in pledge to secure the principal note? * * * When the pawnee transfers his debt and delivers to the transferee the property given to secure the debt, the transaction is not a sale of the pledge but simply places the transferee in the same position which the original creditor occupied. ½ * * The section of our code which authorizes the pawnee to transfer the debt, and with it the thing pawned, seems to be a codification of the common-law. * * *

V.

Again the Plaintiff in Error could not under any circumstances maintain an action for conversion against the defendant bank even if the bank did convert the notes in question by foreclosing the mortgage which secured them. This would be true even though the sale of the notes by the First National Bank of Forsyth under its pledge agreement, and also the sale of the notes in question by the defendant bank under its pledge agreement with Guy were illegal. This question has been before the court so

frequently that there can be no question about it.

See the following cases:

Blood vs. Shepard,
77 Pac. 565 (Kan.);
Ross vs. Barker,
78 N. W. 730;
Winchester vs. Joslyn,
72 Pac. 1076 (Cal.);
McArthur vs. Magee,
45 Pac. 1068 (Cal.);
Glidden vs. Mechanic's National Bank (Supra);
Whipple vs. Dutton,
56 N. E. 581 (Mass.).

In the case of Blood vs. Shepard (Supra) the Court said this:

> "Were the transaction one involving simply a choses in action, there being no real estate mortgage securing them, there would probably be no contention as to the character of the holding or the right of the pledgee, but these bonds of the Rosemont Land Co., were secured by a mortgage. This, however, was but an incident to them; and the law is that when a mortgage which secures choses thus held, is foreclosed and the land bid in by the pledgee, the land becomes, by substitution, the collateral security instead of the choses which the mortgage had before that secured, and as such is governed by the law of pledges and not mortgages."

In the case of Winchester vs. Joslyn (Supra) the following proposition of law was laid down:

> "The sale not having been authorized by the

> pledgee and it not being a judicial sale, is conceded to be illegal. The appellant contends that the action of the appellee in purchasing the pledged property at the sale was tantamount to the conversion of the stock and subjects the pledgee to an accounting for its market value at the time of the conversion. The rule is not as the appellant asserts. When collateral security is purchased by the pledgee, the pledgor has an election to either ratify or disaffirm the sale. If he ratifies the sale, the title to the security becomes absolute. If he disaffirms it, the property remains in the hands of the pledgee, as security, subject to the right of the pledgor to redeem by a payment of the debt."

In the case of McArthur vs. Magee (Supra), the following statement of law is found:

> "An action to foreclose a mortgage which has been assigned as collateral security for the principal debt, is not an action for the recovery of the principal debt, but to preserve and enforce the security, which is a duty imposed upon the creditor by the contract of hypothecation, and the principal debt need not be enforced in such action. Magee was thus entitled, if indeeed it was not his duty to do exactly as he did, foreclose the McArthur mortgage, obtain a deficiency judgment, and collect by foreclosure, the proceeds of the pledged notes and mortgage, and not doing any or all of these things he was not chargeable with conversion. He was also entitled to purchase at the McCormick sale as he

did. And in the absence of fraud he took a free and absolute title and was required only to account to McArthur for the proceeds. Kelly vs. Matlock 24 Pac. 642. Under these circumstances, McArthur's rights are to demand an accounting, under which the proceeds of the McCormick foreclosure would be applied, to reduce or extinguish Magee's personal judgment against McArthur, and Magee would be required to pay over any surplus in funds, or to assign over, after reimbursing himself, whatever personal judgment for deficiency he might still hold against McCormick. But this is not what plaintiff sues for. He has not put defendant in default by demanding such an accounting. He does not plead a refusal so to act, or any facts from which such a refusal might be inferred; for all that appears in the complaint, defendant may have done for and given to plaintiff all that he was entitled to demand."

In view of the authorities above cited, it would therefore seem without question that even though we should accept the theory as advanced by Plaintiff in Error, there would still be no conversion on the part of the Defendant in Error.

VI.

Plaintiff in Error cannot maintain his action for conversion against the Defendant in Eerror, for the reason that the record shows conclusively that the Bank of Montana obtained title to this property through a sale of the pledged property by the First National Bank of Forsyth, and that it further ob-

tained title to this property at the time it was sold under the pledge agreement with Guy.

Counsel for Plaintiff in Error seemed to be laboring under the impression that these sales cannot be made in this way, for the reason that, as he states, they are not made in accordance with the Montana Statute. By referring to the collateral pledge agreements it will be noticed that both of them provide for the sale of the pledged collaterals without notice, and at either public or private sale, and the courts have held that such a contract is valid and binding upon the parties. The California statute is identical with the Montana Code Provisions. It has been held time and again that the parties may waive the statutory provisions by signing agreements providing for the sale of collaterals, without notice, by public or private sale.

Jones on Pledges, paragraph 631 says:

> "The power of sale may provide for a private sale or a sale at public auction, and it may provide for a notice to the pledgor or for a sale without notice."

To the same effect see:

McArthur vs. Magee (Supra);
Williams vs. Hahn,
45 Pac. 851 (Cal.);
Lowe vs. Ozmun,
86 Pac. 729.

VII.

The action of the Plaintiff in Error, as disclosed by the record of this case, was barred by the Statute of Limitations, which was pleaded as a defense. The

answer pleaded the third subdivision of Section 6447 of the Revised Codes of the State of Montana (1907) as a bar to plaintiff's action, but upon the trial this was amended to read the third subdivision of Section 6449 (Tr. 102).

The particular provision of our code which indicates that this action is barred on the part of the Plaintiff in Error reads as follows:

> "An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property, shall be barred if not commemnced within two years."

The courts of California in construing a similar statute have held that this particular statute applies to actions involving conversion. See

Horton vs. Jack,
37 Pac. 552;

Lowe vs. Ozmmun,
70 Pac. 87;

Bell vs. Bank of California,
94 Pac. 889.

In the case of Lowe vs. Ozmun (Supra), the Court used the following language:

> "This action was brought for an alleged conversion by defendant's testator of certain described personal property, namely, bonds and coupons. The complaint shows that the action was commenced within three years, but not within two years, after the alleged conversion; and the court below sustained the demurrer to the complaint upon the ground that the action was barred by subdivision 1 of section 339, Code

Civ. Proc., which provides that 'an action upon a contract, obligation, or liability not founded upon an instrument in writing' must be brought 'within two years.' There is no doubt that this provision includes the cause of action in the case at bar, unless the latter comes expressly within some other category of limitation. 'Liability,' as used in the section, includes responsibility for torts, and 'is applicable to all actions at law not specially mentioned in other portions of the statute.' Piller vs. Railroad Co., 52 Ga. 42. See also Raynor vs. Mintzer, 72 Cal. 590, 18 Pac. 82; McCusker vs. Walker, 77 Ga. 212, 19 Pac. 382; Lattin vs. Gillette, 95 Cal. 317, 30 Pac. 545, 29 Am. St. Rep. 115. But we think that the limitation of the cause of action in the case at bar is specifically declared in section 338, Code Civ. Proc., which provides that there may be commenced 'within three years - - - - an action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property.' The obvious purpose of this provision was to include all actions for torts involving personal property, and we do not think that this purpose can be obscured by invoking strict definitions of the particular words used, or by contrasting them with other words which might have been used, or by nice distinctions between the common-law actions of replevin, detinue, and trover. In cases of unlawful taking or detaining personal property the wronged party has usually the op-

tion of either bringing an action for its specific recovery or an action to recover its value; that is, an action which at common-law would have been replevin or detinue, or trover. Section 338 looks to the wrong,—to the thing itself, —and not to the particular kind of action which may be used to obtain the remedy. This view was expressly declared in Horton vs. Jack, which is to be found reported in 37 Pac. 652, and for some reason did not get into the California Reports; and we have not been referred to any other case in this state holding different. In that case the court says: "The question suggested is whether an action for the conversion of goods is barred by subdivision 3 of section 338, Code Civ. Proc. Respondent claims that such an action is not covered by that section, and is therefore included in section 339, and is barred in two years. The complaint shows that the suit was not commenced within two years after the alleged conversion. Subdivision 3, Para. 338, reads: 'An action for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property.' And the Court, after discussing the meaning of 'conversion' and quoting from authorities, concludes on the point as follows: 'The words in the statute are not used to indicate any particular form of action. But I think it applies to all those cases in which the person injured has a remedy in an action of claim and delivery, or for conversion. Certain-

> ly, one whose property has been wrongfully taken or detained may sue for conversion, if at the time he was entitled to the possession of it. I think the case falls within the provisions of section 338, and the cause of action was not barred.'' It is contended by respondent that what is said on the subject in Horton vs. Jack is dictum; but, whether or not that case might possibly have been decided without a determination of the point in question, still the court fully considered the point, and declared the law on the subject; and, as the conclusion there reached was, in our opinion, right, we have no hesitancy in following it.''

The record in this case discloses without question that Plaintiff in Error knew as early as August, 1915, that the First National Bank of Forsyth had foreclosed its collateral pledge agreement and sold the notes in question to the Bank of Montana. This is shown very clearly by a letter written to Plaintiff in Error, dated August 14, 1915, and which appears in the Transcript of Record on Page 51. Again the record shows that Plaintiff in Error had knowledge of the transactions in question on August 27, 1916 (Tr. 47), and again on August 31, 1916 (Tr. 55), and therefore there can be no question but what the Plaintiff in Error had knowledge that the notes in question were sold by the First National Bank of Forsyth to the Bank of Montana in 1915, and that the Bank of Montana at that time claimed to own them. It therefore appears that the action was not begun within two years after the alleged conversion

took place, and not having been commenced within that time the Statute of Limitations is a bar.

VIII.

The action of the trial court in granting a directed verdict was proper, in view of the fact that the action was brought by plaintiff against the Montana National Bank, when the record discloses that all of the transactions, including the alleged conversion, was with the Bank of Montana. It may be true that the Montana National Bank was a successor in interest to the Bank of Montana, but nevertheless, there is nothing in the pleadings, nor in the evidence, which proves that contention. Counsel for Plaintiff in Error at one time made a motion to amend its complaint to include that allegation but that was never done, and no proof was ever offered showing that the defendant bank was a successor in interest to the Bank of Montana, nor is there any proof showing that it succeeded to all its rights or that it became liable for its torts, if any. The record is clear that the alleged conversion, if any, was done by the Bank of Montana, and not by the defendant bank.

IX.

Further than that, the Plaintiff in Error on the record as disclosed in this case has no standing in court, for the reason that he is barred not only by the Statute of Limitations but because of his laches.

The notes in question were sold by the First National Bank of Forsyth in 1915, and nothing was done by the Plaintiff in Error to protect his rights, if he had any. He was well aware of what was being done and was apparently satisfied. He knew, again,

that his partner, Dr. Guy, had arranged to take care of the firm's indebtedness, as well as the indebtedness of Van Atta himself, with the Bank of Montana, and yet nothing was done to protect himself. Again, he knew that the Bank of Montana was obliged to foreclose its mortgage on the ranch in question in order to protect itself, but no effort was made by him to come in and offer any assistance. He permitted the bank to purchase these notes and to claim ownership of them, and he should not now be heard in any court to assert any title not only to the notes in question or to the property involved.

Counsel for Plaintiff in Error has cited a number of authorities, none of which are in point, upon the facts as disclosed in this record. He cites authorities on the question of collusion and yet there isn't any evidence whatever of collusion. In fact, if there is any evidence of collusion at all it apparently is between Guy and Van Atta. He cites authorities upon the question of tenants in common, or co-tenants, and yet there is nothing in the record to indicate that there is any such question involved in this case. By his own brief, he puts himself out of court, for on Page 31 he says this: "In this transaction those obligations were paid by Guy and he or his wife, whichever it may be, became the owners of them and succeeded to the bank's interest in the pledged notes and he had a right to hold the pledged property as security for these obligations but he did not do that." That in itself shows that plaintiff's case, if any, is against Guy and not against the defendant bank, for the law is too well settled that the bank had an

absolute right to sell the notes in question to Guy, or to any one else, just as the First National Bank had an absolute right to sell the notes in the first instance to the Bank of Montana. Is there anything in this record to indicate that the Bank of Montana did not obtain absolute title to these Morley notes at the time it purchased them from the First national Bank of Forsyth, and, having obtained title to them, there is no law forbidding them to sell them to Guy, or to any one else. In fact, having obtained title to them under the collateral pledge sale, they had a right to dispose of them in the open market, or give them away, and neither Guy nor Van Atta could come in and question the transaction. And, assuming that the sale was illegal, although there is nothing in the record to indicate that it was, even under those circumstances the bank would still have a right to dispose of the property to Guy and take Guy's note in payment of the debt, and in so doing plaintiff's remedy, if any, would be against Guy and not against the bank.

It would seem, therefore, that the Plaintiff in Error cannot under any view of the law, whether adopting his theory or not, have any standing in court. As the trial court said, in denying the motion for new trial (Tr. 39), "There seems nothing to the latter as here presented, save an obsession on the part of plaintiff that by some strategical twist or quirk in the law he can gain possession of former partnership property without payment of partnership and his personal debt for which the property was pledged."

For the reasons hereinbefore set forth, we respectfully submit that the trial court did not err in granting the motion of Defendant in Error for a directed verdict.

Respectfully submitted,

GRIMSTAD & BROWN,

By O. King Grimstad

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